

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

DAVIS WINE IMPORTS, LLC, a)
California Limited Liability)
Company)
Plaintiff,) No. CV-10-650-HU
v.)
VINA Y BODEGA ESTAMPA, S.A.,) OPINION AND ORDER
a Chilean Company)
Defendants.)

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1 HUBEL, Magistrate Judge:

2 Plaintiff Davis Wine Imports, LLC brought claims for breach of
3 contract and breach of the covenant of good faith and fair dealing
4 against defendant Vina Y Bodega Estampa, S.A. Before the court is
5 Davis Wine Imports' Motion for Joinder and for Leave to Amend. For
6 the reasons set forth below, I grant the motion.

7 **BACKGROUND FACTS**

8 Plaintiff Davis Wine Imports, LLC ("Davis LLC") is a wine
9 importing company that conducts business in Oregon, but is based in
10 Davis, California. Defendant Vina Y Bodega Estampa, S.A.
11 ("Estampa") is a winery based in Santiago, Chile. On January 7,
12 2008, Estampa entered into an Importation and Representation
13 Agreement ("the Agreement") with "Davis Wine Imports, LLC,
14 represented by César Gabriel Bistué." Decl. Judith Parker, Ex. 1,
15 at 1. Davis Wine Imports, LLC, did not, however, formally exist as
16 a California limited liability company at the time it entered into
17 the agreement. Although the agreement was eventually signed by
18 Davis LLC, a working draft version of the Agreement between the
19 companies lists "Davis Wine Company" as a party. Decl. Marie
20 Chaisson, Ex. 1, at 1.

21 The Agreement had a five-year term, and under it, Davis LLC
22 was the sole and exclusive representative of Estampa in the United
23 States. Id. It was Davis LLC's obligation under the Agreement to
24 use its best efforts to promote the sale of Estampa's wines. Davis
25 LLC was also obligated to "complete all the legal formalities and
26 compliance procedures for the importation and sale [of wine], both
27 federal and state." Id. at 2. Either party could immediately
28 terminate the Agreement in the event of "[r]evocation or suspension

1 for thirty-one (31) days or more of any license or permit required
2 of [Davis LLC] for the normal operation of its business." Id. at
3 4.

4 On March 20, 2008, a little over two months into the contract,
5 Estampa informed Davis LLC that it did not intend to honor the
6 Agreement. According to Estampa's California counsel at the time,
7 Estampa repudiated because Davis LLC was not properly registered as
8 a business in California, did not possess a valid State of
9 California beer and wine importer's license, and was unable to
10 obtain insurance for shipment of Estampa's products due to Davis
11 LLC's failure to pay other wineries. Parker Decl. Ex. 2, at 1.

12 The record shows that Davis Wine Imports, LLC registered
13 itself as a limited liability company in the state of California on
14 September 5, 2008. Decl. Allison Rhodes, Ex. 2, at 1. Nothing in
15 the record establishes when, if ever, Davis LLC obtained a license
16 to import wine in California or elsewhere.

17 On September 7, 2010, after all of the pending motions were
18 filed, Davis Wine Company registered with the Oregon Secretary of
19 State as an assumed business name of the California LLC. Parker
20 Decl. at ¶ 7. The company is not registered with the Oregon Liquor
21 Control Commission. Id. at ¶ 8.

22 PROCEDURAL HISTORY

23 Davis LLC sued Estampa in Oregon state court on July 20, 2009,
24 making claims for breach of contract and breach of the covenant of
25 good faith and fair dealing. Davis LLC sought at least \$700,000 in
26 damages. Estampa removed the case to federal court on June 8,
27 2010. Estampa filed a motion for summary judgment on July 28,
28 2010, based largely on the fact that Davis Wine Imports, LLC did

1 not exist as an entity at the time it entered into the Agreement.
2 Therefore, argues Estampa, the contract was not valid under
3 California law¹ because the parties were not capable of contracting
4 with one another.

5 Instead of responding to the motion for summary judgment, on
6 August 16, 2010, Davis LLC filed a Motion for Joinder, Leave to
7 Amend, and For An Extension of Time to Respond to Defendant's
8 Motion for Summary Judgment, all currently before the court. The
9 motion seeks to amend the complaint to join Davis Wine Company,
10 which plaintiff asserts is a partnership between German, Sebastian,
11 and Cesar Bistue. Decl. Phil Nelson, Ex. A at ¶ 2.

12 In the original Complaint, Davis LLC brought claims for breach
13 of contract and breach of the covenant of good faith and fair
14 dealing. Def.'s Notice of Removal, Ex. 1 at 5-7. In Plaintiff's
15 Proposed First Amended Complaint, Davis Wine Company brings claims
16 for breach of contract, breach of the covenant of good faith and
17 fair dealing, breach of implied contract, and Davis LLC brings a
18 claim for unjust enrichment. Decl. Phil Nelson, Ex. A at 5-9.

19 According to the Proposed First Amended Complaint, the facts
20 are as follows. Davis Wine Company was formed in 2003 and "is a
21 federally licensed importer, marketer and distributor of
22 international wine throughout the United States." Id. at ¶ 5. In
23 December 2007, Davis Wine Company "notified Estampa that it was in
24 the process of reorganizing as a limited liability company that
25 would be named Davis Wine Imports. As such, Davis Wine Company

27 ¹ The Agreement's choice of law clause dictates that
28 California substantive law applies. See Parker Decl. Ex. 1, at 6.
Neither party argues otherwise.

1 served as the pre-incorporator for Davis Wine Imports." *Id.* at ¶
 2 6. "The parties understood and agreed that Davis Wine Company"
 3 would perform all obligations under the contract, and be entitled
 4 to all the benefits under the contract until and unless Davis Wine
 5 Imports was formed." *Id.* at ¶ 7. "All pre- and post-agreement
 6 correspondence between the parties was addressed to Davis Wine
 7 Company. All invoices and purchase orders issued pursuant to the
 8 contract were in the name of Davis Wine Company. Estampa issued a
 9 press release and a notice to all of its distributors listing Davis
 10 Wine Company as its official importer."

11 **STANDARD**

12 I. Leave to Amend

13 Rule 15(a)(2) provides that leave to amend a complaint should
 14 be "freely given when justice so requires." Generally, leave to
 15 amend is to be granted with "extreme liberality." Morongo Band of
Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). "The
 16 power to grant leave to amend, however, is entrusted to the
 17 discretion of the district court, which determines the propriety of
 18 a motion to amend by ascertaining the presence of any of four
 19 factors: bad faith, undue delay, prejudice to the opposing party,
 20 and/or futility." Serra v. Lappin, 600 F.3d 1191, 1200 (9th Cir.
 21 2010) (affirming denial of motion for leave to amend based on
 22 futility). However, each is not given equal weight. Bonin v.
Calderon, 59 F.3d 815, 845 (9th Cir. 1995). "Futility of amendment
 23 can, by itself, justify the denial of a motion for leave to amend."
 24 *Id.*

25 II. Joinder

26 Rule 19 requires a two-step analysis to determine whether a

1 party should or must be joined. Takeda v. Northwestern Nat'l Life
 2 Ins. Co., 765 F.2d 815, 819 (9th Cir. 1985). Under Rule 19(a), the
 3 court must first determine whether the party is necessary. Id. A
 4 party is necessary if

5 (1) in that person's absence, the court cannot accord
 6 complete relief among existing parties; or (2) that
 7 person claims an interest relating to the subject of the
 8 action and is so situated that disposing of the action in
 9 the person's absence may (i) as a practical matter impair
 10 or impede the person's ability to protect the interest;
 11 or (ii) leave an existing party subject to a substantial
 12 risk of incurring double, multiple, or otherwise
 13 inconsistent obligations because of the interest.

14 Fed. R. Civ. P. 19(a). The "appropriate focus" in determining the
 15 necessity of a party under Rule 19(a) is on the "practical
 16 ramifications of joinder versus nonjoinder." Puyallup Indian Tribe
 17 v. Port of Tacoma, 717 F.2d 1251, 1255 (9th Cir. 1983) (citation
 18 omitted), cert. denied, 465 U.S. 1049 (1984).

19 If the party is necessary, but his joinder will destroy
 20 jurisdiction, then the court must consider whether "in equity and
 21 good conscience" the action should proceed without his joinder.

22 Takeda, 765 F.2d at 819 see also E.E.O.C. v. Peabody W. Coal Co.,
 23 400 F.3d 774, 779 (9th Cir. 2005) (noting that whether a party is
 24 indispensable to an action involves "three successive inquiries"
 25 with the first determining whether the absent party is "required,"
 26 the second determining the feasibility of joinder, and the third,
 27 if the absent party is required and cannot feasibly be joined,
 28 whether "in equity and good conscience, the action should proceed
 among the existing parties or should be dismissed.").

29 Four factors are relevant to the indispensable inquiry:

30 (1) the extent to which a judgment rendered in the
 31 person's absence might prejudice that person or the
 32 existing parties; (2) the extent to which any prejudice

1 could be lessened or avoided by: (A) protective
 2 provisions in the judgment; (B) shaping the relief; or
 3 (C) other measures; (3) whether a judgment rendered in
 4 the person's absence would be adequate; and (4) whether
 5 the plaintiff would have an adequate remedy if the action
 6 is dismissed for nonjoinder.

7 Fed. R. Civ. P. 19(b). Only if the court determines that the
 8 action must be dismissed is the party deemed indispensable.

9 McLaughlin v. International Ass'n of Machinists and Aerospace
 10 Workers Locals 751-A and 751-C, 847 F.2d 620, 621 (9th Cir. 1988).

11 There is no precise formula to follow in a Rule 19
 12 determination. Northern Alaska Envtl. Center v. Hodel, 803 F.2d
 13 466, 468 (9th Cir. 1986) (citation omitted). Rather, the
 14 determination is "heavily influenced by the facts and circumstances
 15 of each case." Id.

DISCUSSION

16 It is well-established California law that a corporation is
 17 not liable for contracts of its promoters unless there is an
 18 express or implied ratification of the contract by the corporation
 19 after it comes into existence. Judelson v. American Metal Bearing
 20 Co., 89 Cal.App.2d 256, 261, 200 P.2d 836, 839 (Cal.App. 2 Dist.
 21 1948) ("A contract of a stockholder or member of a corporation
 22 individually, made before incorporation, is not the contract of the
 23 corporation nor binding on it, unless it expressly or impliedly
 24 ratifies it."); Robinson v. Chapman Square, 77 Cal.App.2d 902, 903,
 25 176 P.2d 945, 945-46 (Cal. App. 1947); see also 15 Cal. Jur. 3d
 26 Corporations § 43. Put otherwise, "it is hornbook law that a
 27 corporation can enforce preincorporation contracts made on its
 28 behalf, as long as the corporation has adopted the contract or
 otherwise succeeded to it." 02 Development, LLC v. 607 South Park,

1 LLC, 71 Cal.Rptr.3d 608, 612 (Ct. App. 2008). But, "[t]o
 2 constitute ratification, the affirmance of a transaction must occur
 3 before the other party has manifested his withdrawal² from it
 4 either to the purported principal or to the agent, and before the
 5 offer or agreement has otherwise terminated or been discharged."
 6 Restatement (Second) of Agency § 88 (1958). Although California
 7 courts have not addressed the situation where a party seeks to
 8 withdraw from a preincorporation contract before it is ratified or
 9 affirmed, "it is generally held that withdrawal at any time prior
 10 to the affirmance is effectual." 12 Williston on Contracts, Effect
 11 of change of circumstances-Withdrawal before ratification, § 35:28
 12 (4th ed.).

13 Defendant argues amendment of the complaint will be futile
 14 based on the discussion above. Defendant relies on the proposition
 15 that the agreement, as a pre-incorporator's contract, can be
 16 avoided if it is repudiated before the corporation is formed or
 17 otherwise ratifies the contract, which defendant alleges in its
 18 motion for summary judgment occurred here. Without reaching the
 19 merits of defendant's position on its motion for summary judgment
 20 against the original complaint, I note there is some confusion
 21 about what exactly Davis Wine Company's theory is for its proposed
 22 three claims against defendant. The record does not reveal whether
 23 Davis Wine Company claims the contract was valid and binding
 24 between it and Estampa with an intention to transfer the
 25 contractual rights and obligations to Davis LLC when it was formed,
 26

27 ² "Refusal to perform the obligations of a purported
 28 contract constitutes a withdrawal." Comment a to The Restatement
 (Second) of Agency § 88 (1958).

1 or is attempting to allege some other rights Davis Wine Company has
 2 and retains after the 2008 formation of Davis LLC. While the court
 3 is skeptical of Davis Wine Company's ability to sustain its alleged
 4 claims in the proposed amended complaint, the record is
 5 insufficiently developed to justify denying the motion to amend as
 6 futile. The better course is to allow amendment and take the
 7 issues raised up on a better developed record on motion from the
 8 defendant.

9 Standing

10 Estampa argues that neither Davis entity has standing to
 11 prosecute this action in Oregon under ORS 648.135³ because Davis
 12 LLC was not registered in Oregon. Davis argues that it cured its
 13 standing issue when the Bistue family registered Davis Wine Company
 14 as their assumed business name on September 7, 2010.

15 Oregon courts have held that ORS 648.135 allows a person to
 16 cure noncompliance with ORS 648.007 "at any time." Pacific Coast
17 Recovery Service, Inc. v. Johnston, 219 Or. App. 570, 575 (2008).
 18 "[S]o long as the violation of ORS 648.007 is rectified at any time
 19 before the action is actually dismissed, the plaintiff can maintain
 20 the action." Id.

21 Davis Wine Company registered to do business in Oregon as an
 22

23 ³ Under ORS 648.135(1), "A person who carries on, conducts
 24 or transacts business in violation of ORS 648.007 shall lack
 25 standing before the courts of this state to maintain a cause of
 action for the benefit of the business. The person may cure the
 incapacity at any time by complying with ORS 648.007."

26 Under ORS 648.007(1), "No person shall carry on, conduct or
 27 transact business under an assumed business name . . . unless the
 28 person has registered the assumed business name as provided in
 this chapter and maintains a current registration."

1 assumed business name of Cesar, German, and Sebastian Bistue, the
2 unregistered partnership that served as the preincorporator of
3 Davis LLC. Typically, "a partnership does not continue to exist
4 after the formation of a corporation." Persson v. Smart
5 Inventions, Inc., 125 Cal.App.4th 1141, 1157, 23 Cal.Rptr.3d 335
6 Cal.App. 2 Dist. (2005). The authorities, however, do recognize
7 limited exceptions to the principle that partnerships cease to
8 exist after the formation of a corporation. Id. at 1158. For
9 example, "Partners may, by agreement, continue their relations as
10 co-partners in conjunction with their relationship as stockholders
11 of a corporation[.]" Id. But "in the absence of such an
12 agreement", a California court will not typically find that the
13 partnership continued after corporate formation. Id. at 1159.

14 Here, the record is insufficient to determine if the
15 partnership continued to exist after the formation of the LLC.
16 Therefore, it is premature to address whether either entity has
17 standing to sue in the District of Oregon.

18 **CONCLUSION**

19 Plaintiff's motion for joinder and leave to amend [doc. #16]
20 is granted.

21 IT IS SO ORDERED.

22
23 Dated this 11 day of March, 2011.

24 /s/ Dennis J. Hubel

25
26
27 Dennis James Hubel
28 United States Magistrate Judge